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ESSAY

CLASS ACTION "FAIRNESS"—A BAD DEAL FOR THE STATES AND CONSUMERS

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The House of Representatives has repeatedly considered bills that would expand federal diversity jurisdiction to include class actions in which only minimal diversity exists between plaintiffs and defendants. Though three such bills have failed, members of Congress will probably propose another. In this Essay, Representative John Conyers Jr. (D-Mich.) argues that enacting this legislation would be a mistake. Such a change would add to the already heavy burdens of the federal court system and would obstruct state courts' application of both the substantive and the procedural law of their states. Expanding diversity jurisdiction in this manner would impose unfair disadvantages on class action plaintiffs, threatening suits against the tobacco and firearms industries, among others.

Class action procedures establish a mechanism to aggregate claims against a single defendant, offering access to courts to plaintiffs who would otherwise be barred because their claims are too small to justify the expense of a lawsuit. Last year, the House of Representatives passed a bill that, if enacted, would have undercut the very purpose of these procedures by making it far more burdensome, expensive, and time-consuming for groups of injured persons to mount class action claims.[1] Though the 107th Congress adjourned before the Senate voted on the bill, in effect killing it, the issues underlying this legislation are far from dead: even though the 107th Congress was the third consecutive Congress to refuse to enact this type of bill,[2] new versions have been introduced in the 108th Congress.[3]

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* Member, United States House of Representatives (D-Mich.). Wayne State University, 1957; L.L.B., 1958. Portions of this Article appeared as Dissenting Views in the House Committee on the Judiciary's report concerning the Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002). *See* H.R. REP. No. 107-370, at 123–34 (2002). I was the ranking signatory of the Dissenting Views. *See id.* at 134.

[1] *See* H.R. 2341. The House Committee on the Judiciary passed this bill, introduced by Representative Bob Goodlatte (R-Va.), on March 7, 2002 by a 16-10 vote. *See* H.R. REP. No. 107-370, at 22 (2002). The Act passed the House on March 13, 2002 by 233-190 vote. *See* 107 Cong. Rec. H885 (daily ed. Mar. 13, 2002).

[2] The first bill appeared during the 105th Congress, when the Judiciary Committee marked-up and reported out the Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998). *See* H.R. REP. No. 105-702, at 10 (1998). The full House never considered that bill. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-12 vote, the Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999). *See* H.R. REP. No. 106-320, at 12 (1999). On September 23, 1999, the House passed House Bill 1875 by a vote of 222-207, but the measure was not considered on the Senate floor. *See* 106 CONG. REC. H8594 (daily ed. Sept. 23, 1999).

[3] The Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003), was introduced on March 6, 2003 by Representative Bob Goodlatte (R-Va.). *See* 149 CONG. REC.

These bills would make it more difficult to enforce fraud, civil rights, consumer health and safety, and environmental laws, to name but a few. They even go so far as to prevent state courts from considering class action cases that involve only violations of state laws.

The Class Action Fairness Act of 2002, the most recent version of such legislation,[4] would have allowed defendants to remove state class action claims to federal court in cases involving violations of state law whenever any member of the plaintiff class and any defendant were citizens of different states, a situation known as minimal diversity.[5] This change would have overturned a nearly 200-year-old principle requiring that all plaintiffs be citizens of different states from all defendants—known as complete diversity—before a state law case can be heard in federal court.[6] Under the Act, only three circumstances would keep a typical minimal diversity case out of federal court: federal courts would not have jurisdiction where (1) a "substantial majority" of the members of the proposed class were citizens of the same state of which the primary defendants were citizens, and the claims asserted would be governed primarily by laws of that state ("an intrastate case"); (2) all matters in controversy did not exceed $2,000,000 or the proposed class included fewer

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E405 (daily ed. Mar. 7, 2003) (statement of Rep. Goodlatte). This bill is similar to the 107th Congress's House Bill 2341, but the new bill does not include the following requirements present in the old one: (1) the disclosure of attorney's fees, (2) public records, and (3) a report from the Judicial Conference of the United States on class action fees and settlements. *Compare* H.R. 2341, §§ 3(a), 7, *with* H.R. 1115. The Senate's version of the new bill, The Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003), was introduced on February 4, 2003 by Senator Charles Grassley (R-Iowa) and others. *See* 149 CONG. REC. S1873 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley). As introduced, Senate Bill 274 differed from House Bill 1115 only in that it required disclosure of proposed class action settlements to state and federal officials. *Compare* 249 CONG. REC. S1875 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley), *with* H.R. 2341. However, on April 11, the Senate Judiciary Committee reported the bill favorably with two substantial amendments. First, the amount in controversy was increased to $5,000,000. *See Washington in Brief*, WASH. POST, Apr. 12, 2003, at A6. The second amendment provided that a case must remain in state court if two-thirds of the plaintiffs are from the same state as the defendant, and it must be removed to federal court if fewer than one-third of the plaintiffs are from the same state as the defendant. *See* James Politi, *Senate Moves to Curb Class Action Lawsuits*, FIN. TIMES, Apr. 12, 2003, at 7. In cases in which more than one-third but fewer than two-thirds of plaintiffs are from the same state as the defendant, the federal judges to whom the actions would be removed will decide whether to accept removal. *See id.* This provision replaced general language that barred removal when a "substantial majority" of plaintiffs are not diverse from the defendant. *See* 149 CONG. REC. S1875 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley). While these changes afford some protection to class action plaintiffs, most cases will still be subject to removal and to all of the attendant problems discussed in this Essay.

[4] The three recent proposals have been substantially the same. *Compare* H.R. 2341, § 4(a), *with* H.R. 3789, § 2(a) *and* H.R. 1875, § 3(a).

[5] *See* H.R. 2341, § 4(a).

[6] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting predecessor to the diversity jurisdiction statute, 28 U.S.C. § 1332). The Supreme Court has also limited opportunities for removal to federal court by holding that the citizenship of unnamed plaintiffs cannot create the required diversity. *See* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 364–66 (1921).

than 100 members ("a limited scope case"); or (3) the primary defendants were states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief ("a state action case").[7]

Under the bill, when a suit filed as a class action in state court was removed to federal court, the court would have been required to dismiss it if it did not satisfy the federal class action requirements.[8]

The Judiciary Committee majority that approved the bill apparently intended this provision to bar refiling the case in state court as a class action. The Committee rejected an amendment to the bill offered by Representative Barney Frank (D-Mass.) that provided that if, after removal, the federal district court determined that a case did not meet the federal class action requirements, the court would remand the action to the state court and permit the state court to certify the class under state law.[9] The majority's refusal to adopt this amendment suggests that it believed the unamended language would have produced a contrary result, that is, that denial of certification under federal law would bar certification under state law.[10]

The Class Action Fairness Act of 2002 and legislation like it would harm both the federal and the state court systems.[11] As a result of Con-

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[7] H.R. 2341, § 4(a). The legislation also excluded securities-related and corporate governance class actions from coverage and made a number of other procedural changes, such as easing removal procedures, *see id.* § 5(a)–(b), and, where federal courts dismiss class actions and plaintiffs later bring them as individual actions in state court, deeming statutes of limitations tolled for the time the case was in federal court. *See id.* § 4(a)(2). The bill also contained a so-called "Consumer Class Action Bill of Rights," H.R. 2341, § 3(a), which included judicial scrutiny of coupon and other noncash settlements; protection against a settlement that would result, after payment of attorneys' fees, in a net loss to a class member; protection against discrimination based on geographic location; prohibition of class representatives' receiving a greater share of an award than other class members; and "plain English" requirements. *See id.* It failed, however, to do anything at all to address one of the greatest consumer abuses to occur in class action lawsuits: "sweetheart" deals, which pay off one class to eradicate future claims that are not yet before the court. For example, a federal court in New Jersey approved a settlement protecting the defendant insurance company from all future claims related to any deceptive sales practice, even though the final version of the complaint charged only three specific types of deceptive sales tactics. *See In re* Prudential Ins. Co. of Am. Sales Practice Litigation, 148 F.3d 283, 326 (3d Cir. 1998) (affirming approval of the settlement).

[8] *See* H.R. 2341, § 4(a).

[9] *See* H.R. REP. No. 107-370, at 22–23 (2002).

[10] *See* Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 96 (1935) (describing the fact that Congress rejected an amendment to a bill that would have excluded gas stations from the definition of "store" as "a circumstance to be weighed along with others" in favor of interpreting the unamended bill, subsequently enacted, to include gas stations within the definition of "store"). *See also* Gambardella v. G. Fox & Co., 716 F.2d 104, 109 n.5 (2d Cir. 1983) (following *Fox* in similar situation); Donovan v. Hotel, Motel and Rest. Employees and Bartenders Union, Local 19, 700 F.2d 539, 544–45 (9th Cir. 1983) (same); Nat'l Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 706 (D.C. Cir. 1971) (reaching the same conclusion in similar situation without reference to *Fox*).

[11] *See infra* Part I.

gress's increasing propensity to federalize state crimes,[12] the federal courts are already facing a dangerous workload crisis.[13] Bringing resource-intensive class actions into federal court would further aggravate this problem. At the same time, if these cases return to state court because federal class certification is denied,[14] the legislation would apparently permit only case-by-case adjudication of many similar claims, draining away precious state court resources.

House Bill 2341 and other legislation like it would also obstruct state law.[15] It would prevent states from implementing both their substantive tort law and their procedural class action law. In the case of procedural law, this change would harm plaintiffs disproportionately because many states have chosen to grant class action certification more frequently than has the federal government.[16]

Before considering a fourth version of this legislation, the House should insist on receiving objective and comprehensive data justifying the proposed intrusion into state court jurisdiction. Currently, no such data exist.[17] In short, the changes to class action adjudication that have been proposed have little evidence in their favor and offer numerous reasons for judges, consumers, and legislators to call for their rejection.

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[12] *See* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278–82 (1995).

[13] *See infra* text accompanying notes 20–25.

[14] *See* H.R. 2341, § 4(a).

[15] *See infra* Part II.

[16] *See infra* text accompanying notes 75–89.

[17] The most comprehensive study completed was the 1994–95 Federal Judicial Center review of class actions, which rebutted claims that class actions constituted frivolous "strike" suits and that attorneys were unreasonably benefiting from class action cases. *See* WILLGING, ET AL., FED. JUD. CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 90 (1996). The other studies cited by supporters of class action legislation are incomplete and inconclusive. The Stateside Associates study cited in the congressional testimony of representatives of Ford Motor Company and the United States Chamber of Commerce, *see Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 100 (1998) [hereinafter *Mass Torts and Class Action Lawsuits*] (prepared statement of John W. Martin Jr., Vice President General Counsel, Ford Motor Co.); *id.* at 133–34 (prepared statement of John B. Hendricks, President, Alabama Cryogenic Engineering, Inc., representing Chamber of Commerce of the U.S.), covered only six Alabama counties. *See* STATESIDE ASSOCIATES, CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998), *reprinted in Mass Torts and Class Action Lawsuits*, *supra*, at 140. A more recent study conducted in part by Stateside Associates evaluated just three counties: one each in Florida, Illinois, and Texas. *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 158–59 (2001).

I. EXPANDING DIVERSITY JURISDICTION UNNECESSARILY BURDENS THE FEDERAL AND STATE COURT SYSTEMS

The Class Action Fairness Act of 2002, House Bill 2341, and other measures like it would burden both the federal and state court systems by increasing the number of class action cases heard in the former and the number of individual suits heard in the latter. Proponents of this legislation argue that enduring these hardships is the only way to protect defendants against biased local courts, but the Constitution provides other methods for guarding against the few vestiges of parochial prejudice that remain with us today.

Expanding federal diversity jurisdiction to include more class actions will inevitably result in a significant increase in the federal courts' workload. Class action cases require more money and attention than almost any other type of litigation.[18] If more of these cases moved to the federal system, addressing them "could require substantial additional Federal resources."[19] The workload problem in the federal courts is currently at an acute stage. The most recent available statistics, covering 2001, indicate that federal district courts are seeing 377 civil filings per authorized judgeship each year.[20] This figure underestimates the problem, because it includes all authorized judgeships, ignoring the fact that many remain unfilled.[21]

Chief Justice Rehnquist has criticized Congress and President Clinton for exacerbating the courts' workload problem with legislation that brought more cases into the federal system.[22] If the trend continued, he said, "just filling the vacancies [on the courts] will not be enough. We will need additional judgeships."[23] Even Judge Richard A. Posner, who believes federal courts have responded well to their growing caseload,[24] describes the courts today as "a defending army that has used up all its ammunition repelling an attack and is nervously waiting to see whether

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[18] *See* Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to Representative Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the House Judiciary Committee Democratic staff).

[19] *Id.* at 1.

[20] *See* 2001 JUDICIAL BUSINESS OF UNITED STATES COURTS, ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 21 (2001).

[21] As of April 11, 2003, fifty judicial seats were vacant, accounting for nearly six percent of federal judicial positions. Office of Legal Policy, U.S. Dep't of Justice, Judicial Nominations, *at* http://www.usdoj.gov/olp/judicialnominations.htm (last visited Apr. 11, 2003).

[22] *See* Chief Justice William Rehnquist, Is Federalism Dead?, Address Before the American Law Institute (May 11, 1998), *in* LEGAL TIMES, May 18, 1998, at 12.

[23] *Id.*

[24] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM xiii (1996) (noting "[t]he success of the federal courts in coping with a caseload that ten years ago I would have thought wholly crippling").

the attack will be renewed."[25] There can be no doubt that expanding federal jurisdiction through House Bill 2341 would have brought a new onslaught of cases to federal court.

In addition to its impact on the federal courts, House Bill 2341 would also burden state courts. In cases where the federal court fails to certify a class action, the legislation apparently prohibits states from using their own class action procedures to resolve the underlying state causes of action.[26] It is important to consider the context in which this legislation would apply. Imagine that a class action suit has been filed in state court involving numerous state law claims, each of which, if filed separately, would not be subject to federal jurisdiction.[27] The defendants remove the case to federal court because there is minimal diversity between them and the plaintiff class, and the federal court denies class certification under the federal rules. Because the minimal diversity rules of House Bill 2341 would apply only to class action cases, the federal court no longer has jurisdiction and the case returns to state court.[28] As a result, hundreds, if not thousands, of potential new cases will be unleashed because plaintiffs apparently would not be able to seek class certification under state law.[29]

Arguments by proponents of the Bill that undermining both state and federal courts in these ways is justified because state courts are "biased" against out of state defendants in class action suits[30] lack foundation. First, the Supreme Court has made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,[31] the Supreme Court held that in class action cases, state courts must ensure that (1) the defendant receives notice and an opportunity to be heard and participate in the litigation, (2) an absent plaintiff is provided with an opportunity to remove himself or herself from the class, (3) the named plaintiff at all times adequately represents the interests of the absent class members, and (4) the forum state has a significant relationship to the claims asserted by each member of the plaintiff class.[32] Federal courts

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[25] *Id.* at 187.

[26] *See supra* text accompanying notes 9–10.

[27] *See* 28 U.S.C. § 1332(a) (Supp. 2002).

[28] *See* Class Action Fairness Act of 2002, H.R. 2341, § 4(a), 107th Cong. (2002).

[29] *See supra* text accompanying notes 9–10.

[30] *See, e.g.*, H.R. 2341, § 2(a)(5)(b) (finding that county and state courts "sometimes act[ ] in ways that demonstrate bias against out-of-State defendants"); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 484 (2000) ("State courts often express bias against out-of-state corporate defendants . . . ."). It is worth noting that any claim that state courts are biased as compared to federal courts is in fact a charge that state court judges are biased because in both state and federal court juries are derived from citizens of the state where suit is brought.

[31] 472 U.S. 797 (1985).

[32] *See id.* at 806–10.

already have ways of exercising oversight if state courts fail in these duties.[33] Most critically, federal courts need not grant state court decisions full faith and credit where parties do not receive the due process required in *Shutts*; that is, they can allow defendants to launch collateral attacks in federal court against judgments awarded in such cases.[34]

Second, the assumption that out-of-state defendants will be victims of prejudice in state courts—the principle underlying diversity jurisdiction[35]—may have been valid once, but it is no longer. Today many large businesses have a substantial commercial presence in more than one state, through factories, business facilities, or employees. If General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees,[36] it does not seem reasonable to expect them to face any great risk of bias simply because their principal places of business are in Michigan and they are incorporated in Delaware.[37] Nevertheless, under the proposed class action legislation, these hypothetical cases would be subject to removal by the defendant to federal court.[38] The Judicial Conference recently determined that fear of local prejudice by state courts was no longer justified and that keeping the federal judiciary's efforts focused on federal questions was a more significant issue.[39] The Conference's conclusion prompted Congress to cut back diversity jurisdiction by increasing the amount in controversy needed before a federal court can hear a diversity case from $50,000 to $75,000.[40]

Moreover, interest in limiting diversity jurisdiction is not new; calls to do so date back at least to the 1920s.[41] This interest has grown as fears

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[33] *See* Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 110–20 (2001).

[34] *See id.* at 111–15.

[35] *See* AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969).

[36] Jim Weiker, *State Feels Weight of Retailer in Many Ways*, COLUMBUS DISPATCH, Mar. 30, 2003, at 1G (noting that General Motors has approximately 24,000 employees in Ohio); Christopher Jensen, *New-Car Sales Downshift in NE Ohio*, PLAIN DEALER, Jan. 22, 2003, at C4 (noting that Ford has approximately 10,000 employees in northeast Ohio).

[37] *See* Grimes v. General Motors Corp., 205 F. Supp. 2d 1292, 1292 (M.D. Ala. 2002); Ford Motor Co. v. Meredith Motor Co., Inc., 257 F.3d 67, 68–69 (1st Cir. 2001). Similarly, if the Walt Disney Corporation—headquartered in California and incorporated in Delaware, *see* Walt Disney Co. v. Nelson, 677 So. 2d 400, 402 (Fla. Dist. Ct. App. 1996), and one of Florida's largest employers, *see* Robert Johnson, *Disney Cuts Workers' Hours; Schedules Trimmed*, ORLANDO SENTINEL, Feb. 21, 2003, at C1 (noting that Disney World has 54,000 employees in central Florida)—were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the federal courts because of a concern for local prejudice.

[38] *See* H.R. 2341, § 5(a).

[39] *See* THE JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 30–31 recommendation 7 (1995).

[40] *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (codified at 28 U.S.C. § 1332(a) (Supp. 1998)).

[41] *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and*

of local court prejudice have subsided[42] and concerns about diverting federal courts from their core responsibility—deciding federal questions—have increased.[43] More than three decades ago the American Law Institute concluded that "none of the significant prejudices that beset our society today begins or ends when a state line is crossed."[44] In 1978, the House passed legislation that would have abolished diversity jurisdiction.[45] The most recent Federal Courts Study Committee report on the subject concluded that local bias was no longer a compelling justification for retaining diversity jurisdiction.[46] The Committee concluded that diversity jurisdiction should be eliminated, with only "narrowly defined exceptions."[47]

State Courts, 13 CORNELL L.Q. 499, 523 (1928).

[42] As Judge J. Skelly Wright wrote, his and other federal judges' suspicions of state courts in the early postwar years were driven by the fact that "if one examined the judgments of state courts anywhere during the first half of this century, and even a little beyond, the trumpet of liberty would seldom be heard, especially on behalf of the poor, the unpopular, and the unconventional." *See* J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 173 (1984).

[43] *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (Apr. 2, 1990) ("One purpose of these recommendations is to improve the federal courts' capacity to resolve disputes that most need federal court attention by relieving them of some functions that involve federal rights or interests only marginally if at all.")

[44] *See* AM. LAW INST., *supra* note 35 at 99, 106.

[45] *See* 124 CONG. REC. H5008–09 (daily ed. Feb. 28, 1978) (approving House Bill 9622, a bill for "the abolition of diversity of citizenship jurisdiction in federal courts"). The legislation was not considered in the Senate. For more information on the bill, see generally H.R. REP. NO. 95-893 (1978).

[46] FED. COURTS STUDY COMM., *supra* note 43, at 40.

[47] *Id.* at 39. For calls to reduce or eliminate diversity jurisdiction, see HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 149–50 (1973); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 38 (1955); George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 377–78 (1933); Robert H. Bork, Dealing with the Overload in Article III Courts, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 1976), *in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 231, 236–37 (1976); M. Caldwell Butler & John D. Eure, *Diversity in the Court System: Let's Abolish It*, 11 VA. B. ASS'N J. 4, 9 (1985); Frank M. Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 BROOKINGS REV. 34, 34 (Winter 1992); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 6 (1968); Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 N.Y. ST. B.J. 14, 14 (1989); Elmo B. Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. REV. 347, 355–56 (1978); Robert J. Sheran & Barbara Isaacman, *State Cases Belong In State Courts*, 12 CREIGHTON L. REV. 1, 68 (1978); Clement F. Haynsworth Jr., Book Review, 87 HARV. L. REV. 1082, 1089 (1974) (endorsing Judge Friendly's proposal to abolish diversity jurisdiction).

Ironically, during the 105th Congress, the Republican leadership was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Representative Henry Hyde (R-Ill.), then Chairman of the Judiciary Committee, said:

> I simply say the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest . . . when the judge raises his hand, [in] State court or Federal

The expansion of diversity jurisdiction promoted by the supporters of House Bill 2341 ignores decades of scholarly and judicial thought. It addresses problems of bias long since overcome and exacerbates problems of overcrowding that are very much with us.

II. Expanding Diversity Jurisdiction Would Obstruct State Law

In addition to these administrative problems, House Bill 2341 would have created constitutional difficulties. It would have obstructed state law in both procedural and substantive areas, upsetting the fragile balance required by our federal system.

Proponents of House Bill 2341 and similar legislation argue that federal courts should have jurisdiction over more class actions because many of these cases, such as those claiming hundreds of millions of dollars against national corporations, affect interstate commerce and, therefore, issues of national concern.[48] These arguments overlook the fact that where class actions are based in tort—as some of the most frequently scrutinized class actions are—they also raise significant issues of state law. Tort law is one of the classic concerns of state common law,[49] and doctrinal "differences from one state to another are not mere matters of detail, but affect basic issues of duty, standard of care, causation, affirmative defenses, and recoverable damages."[50] In tobacco suits, in particular, issues such as the significance of an alleged tortfeasor's failure to warn, a victim's assumption of risk, comparative negligence, and market-share liability are likely to arise, and states have widely different views on each of these matters.[51] Allowing each state to apply its own law comports with basic federalism principles and allows the states to serve as laboratories of law, testing different approaches and comparing the results.[52]

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court, they [sic] swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604 (daily ed. Apr. 18, 1996).

[48] *See, e.g.*, H.R. Rep. No. 107-370, at 7 (2002); Beisner & Miller, *supra* note 17, at 151; Schwartz et al., *supra* note 30, at 486.

[49] *See* Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. Pa. L. Rev. 2263, 2265–68 (2000).

[50] Robert A. Sedler & Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to 'A View from the Legislature,'* 73 Marq. L. Rev. 625, 629 (1990).

[51] *See* Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation over Tobacco Injuries*, 33 Ga. L. Rev. 979, 1016–20 (1999).

[52] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

Advocates of expanding diversity jurisdiction reply that federal courts regularly interpret state law when they decide diversity cases.[53] In fact, however, federal courts sitting in diversity do something slightly but significantly different from what state courts do. When federal courts decide diversity cases, they try to determine what a state court would decide if faced with the same question,[54] "reducing their role in legal development from making law to forecasting it."[55] Because these forecasts do not carry the force of law beyond the cases in which they are issued, state courts subsequently presented with the same issues have the authority to disregard them and reach their own conclusions.[56] One difficulty with federal forecasting, especially when state law is unsettled, is that federal courts may simply make mistakes;[57] federal courts have even been known to make mistakes in favor of plaintiffs, expanding liability where state courts later contracted it.[58] A related difficulty is that, until a state court rules on the same issue in a subsequent case, no one knows whether a federal court sitting in diversity was right or wrong in its application of state law—a question of law, which could have been resolved if a state court had decided the case, remains open.[59] Worst of all, because of the difficulties of predicting how a state court will decide a question, federal judges put "laborious, often onerous[ ]" efforts into reaching these undesirable results.[60]

House Bill 2341 and similar measures would obstruct state law even in some consumer protection cases that are not class actions. For instance, some states have laws that protect consumers by prohibiting de-

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[53] *See* Beisner & Miller, *supra* note 17, at 153.

[54] JAMES WM. MOORE ET AL., 17A MOORE'S FEDERAL PRACTICE CIVIL § 124.22 (3d ed. 1997) ("When state law is unsettled, the federal court must attempt to predict how the state's highest court would rule if confronted with the issue.") (citing Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967); Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956)). For data suggesting that federal courts may be violating this doctrine and thereby exacerbating the problems with diversity jurisdiction, see POSNER, *supra* note 24, at 218 tbl.7.2.

[55] Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 224 (1994).

[56] *See* Moore v. Sims, 442 U.S. 415, 428 (1979) (observing that a federal court's interpretation of state law "is not binding on state courts and may be discredited at any time"); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992) (Posner, J.) ("State courts are not bound by federal courts' interpretations of state law."); Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969) ("In a diversity case neither this Court nor the District Court make any declarations of law. . . . Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties.").

[57] *See* Weber, *supra* note 55, at 230–31 (describing state court decisions that federal courts probably would not have predicted).

[58] *See id.* at 231 n.101.

[59] *See* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 322–23 (1967) (citing examples).

[60] *Id.* at 321.

ceptive business practices.[61] These laws may be enforced by the state attorney general or, if the state attorney general does not act, by state citizens.[62] The Bill might have forced such cases into federal court because plaintiffs in them represent the interests of the "general public," the language in House Bill 2341 that would have triggered the new diversity rule.[63] For the same reason, the Bill might have reached some claims filed by municipalities, such as the city of Newark's suit against gun makers, distributors, and retailers now pending in state court in New Jersey.[64] The state appellate court has let stand the city's claims of negligence and creation of a public nuisance,[65] but removal to federal court under House Bill 2341 would have been fatal: a federal district court in New Jersey dismissed similar claims and was affirmed by the Third Circuit.[66]

House Bill 2341 would not only have obstructed the application of substantive state tort law, it would also have stripped state courts of their ability to use the class action procedure.[67] As the Conference of Chief Justices stated, an earlier version of the legislation in essence would have "unilaterally transfer[ed] jurisdiction of a significant category of cases from state to federal courts" and achieved a "drastic" distortion and disruption of traditional notions of federalism.[68]

The Supreme Court has found that efforts by Congress to dictate state court procedures implicate important Tenth Amendment federalism concerns. For example, in *Johnson v. Fankell*,[69] the Court reiterated what it termed "the general rule" that, because states should maintain control over procedures in their courts, "Federal law takes State courts as it finds them."[70] By blocking claims that are denied class certification in federal

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[61] *See, e.g.*, CAL. CIV. CODE §§ 1750–1784 (West 1998); MICH. COMP. LAWS § 445.901–.922 (2001).

[62] CAL. CIV. CODE §§ 1780–1781 (West 1998); MICH. COMP. LAWS §§ 445.907(6)(c), 445.911(3) (2001).

[63] *See* H.R. 2341, § 4(a). Representatives Zoe Lofgren (D-Cal.) and Adam Schiff (D-Cal.) introduced an amendment to limit the bill to affect only consumer class actions. *See* H.R. REP. No. 107-370, at 95–97 (2002). The House Judiciary Committee rejected this proposal 11 to 17. *See id.* at 107. Like the majority's rejection of Representative Frank's amendment, this vote suggests that House Bill 2341 was indeed intended to bar individual consumer protection actions. *See supra* text accompanying notes 9–10.

[64] *See* Megan Rhyne, *Suit Against Gun Makers Goes Forward*, NAT'L L.J., Mar. 24, 2003, at B1.

[65] *See* James v. Arms Tech., Inc., 2003 WL 942781, at *1 (N.J. Super. Ct. App. Div. Mar. 11, 2003).

[66] *See* Rhyne, *supra* note 64, at B1 (describing Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001)).

[67] *See supra* text accompanying notes 9–10.

[68] Letter from Chief Justice David A. Brock, President of the Conference of Chief Justices, to Representative Henry J. Hyde, Chairman of the Committee on the Judiciary 1 (July 19, 1999) (on file with the House Judiciary Committee Democratic staff).

[69] 520 U.S. 911 (1997).

[70] *Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)) (holding that federal law did not preempt Idaho procedural rules) (internal quotation marks omitted).

court from being re-filed as class actions in state court, House Bill 2341 would not have left state courts as it found them but instead would have effectively prevented them from hearing one form of case. Professor Laurence Tribe has argued that the principle described in *Fankell* applies to this type of legislation, testifying before Congress that it "would raise serious questions" of federalism.[71]

State rules governing class actions often differ dramatically from federal rules. These differences do not indicate bias in favor of class action plaintiffs, as proponents of House Bill 2341 argue[72]: state courts frequently refuse to certify class actions.[73] Like differences among states' tort laws, differences among states—and between the states and the federal government—in law governing class actions are the result of legislative and judicial choices that the federal government must respect.

Class actions filed in federal court must meet the requirements of Federal Rule of Civil Procedure 23.[74] Under the current version of the rule, all class actions must meet each of four primary requirements:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[75]

Every class action must also meet one of three secondary requirements.[76] These are generally viewed as establishing three categories of class action. The first category includes actions in which litigation of individual suits by or against the proposed class members would risk creating "inconsistent or varying adjudications," or would dispose of other members'

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[71] *The Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 165 (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[72] *See* Schwartz et al., *supra* note 30, at 484.

[73] *See generally* Linda S. Mullenix, *Abandoning the Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709 (2000) (arguing that courts in Alabama, Louisiana, and Texas are becoming more hostile to class action certification); Melodie C. Hahn, Comment, *Smokers' Chances of a Fair Fight against the Tobacco Companies Go Up in Flames: A Study of* Philip Morris v. Angeletti *and its Effect on the Viability of Class Action Lawsuits in Maryland Tobacco Litigation*, 31 U. BALT. L. REV. 103 (2001) (arguing that certification of plaintiff classes suing tobacco-industry defendants is nearly impossible to obtain in Maryland state courts). Federal district courts have certified their share of inappropriate classes, and the Supreme Court has established some of its most significant precedents by striking down their certifications. *See* Ortiz v. Fireboard Corp., 527 U.S. 815 (1999); Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

[74] *See* FED. R. CIV. P. 23.

[75] *Id.* at 23(a).

[76] *See id.* at 23(b).

the costs of notice.[86] Because the median noticing costs are in the six-figure range in some federal districts,[87] looser notice requirements make class actions available to a wider group of citizens in state court than in federal court. In another example, Indiana grants class action certification more freely than federal courts in the Seventh Circuit do.[88] In still another example, Ohio courts evaluating whether Ohio's equivalent to a 23(b)(3) claim meets the predominance requirement have focused on the ability of a class action to permit people with small claims to have their day in court, an approach friendly to class claims.[89]

In the substantive law of tort and the procedural law of class actions, proposals to expand diversity jurisdiction would intrude on the powers and responsibilities of the states. This intrusion would, in most cases, redound to the detriment of plaintiffs because of the choice many states have made to establish easier certification requirements than those of the federal government.

III. Expanding Diversity Jurisdiction Would Restrict Liability Actions in a Broad Range of Cases

Even where state law is similar to federal law, House Bill 2341 and legislation like it would harm class action plaintiffs by allowing defendants to bring their cases into federal court. Litigating in federal court is more expensive than in state court.[90] Given the backlog in the federal courts and the fact that federal courts are obligated to resolve criminal mat-

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[86] *See, e.g.*, *id.* at 136, 427–28 (quoting D.C. Super. Ct. R. Civ. P. 23-I(c)(3); N.J. R. Civ. P. 4:32-2(b)).

[87] *See* Willging et al., *supra* note 17, at 48.

[88] *See* State Survey, *supra* note 80, at 214 (discussing Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001)). *See also id.* at 257 ("Kansas courts have broader authority to change an individual petition to a class action than is allowed under F.R.C.P. 23.").

[89] *See id.* at 498 (citing Hamilton v. Ohio Savings Bank, 694 N.E.2d 442 (Ohio 1998)). Loosening of predominance requirements in state courts is particularly significant when compared to recent tightening of those requirements in federal courts. *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 622–24 (1997) (holding that the "benefits [putative class members] might gain from the establishment of a grand-scale compensation scheme . . . is not pertinent to the predominance inquiry" and that putative class members' exposure to asbestos supplied by defendants did not fulfill the predominance requirement, "[g]iven the greater number [and significance] of questions peculiar to the several categories of class members, and to individuals within each category"); Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (holding that in considering predominance, court must look beyond the pleadings to "the claims, defenses, relevant facts, and applicable substantive law"); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (holding that predominance requirement is not met by putative class of plaintiffs who used penile prostheses manufactured by the same company because "the products are different, each plaintiff has a unique complaint, and each receives different information and assurances from his treating physician").

[90] *See Class Action Fairness Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong. 38–39 (2002) (prepared statement of Andrew Friedman, Partner,

ters before civil matters where doing so is reasonable,[91] even when plaintiffs are able to certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court. These effects would harm plaintiffs disproportionately because of the nature of the claims class actions allow: those lodged collectively by many people who have suffered small injuries. Because their potential return is so small, these are precisely the people who will be deterred by procedures that require more time and money.

The vague terms used in the legislation may also work to the disadvantage of plaintiffs. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws[92] are new and undefined, with no precedent in the United States Code or case law. It will take many years of conflicting decisions before these critical terms can begin to be sorted out. The vagueness problems will be particularly acute for plaintiffs: if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred.[93] If, however, a defendant guesses wrong and jurisdiction does not lie in the federal courts, the defendant will be no worse off and will have benefited from the delays caused by the failed removal motion.

The cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. Take, for example, the numerous class action lawsuits filed across the country against Bridgestone/Firestone Incorporated and Ford Motor Company claiming that the companies' negligence led to the production and use of tires that caused roll-over accidents.[94] As discussed above, certification of the proposed classes in these cases could be more difficult under federal law.[95] Some federal courts have already denied class standing in tire cases upon a finding that the proposed class could not meet Rule 23(b)(3)'s predominance requirement.[96] This fact is particularly troubling when the suits arise in states that have more flexible certification requirements, such as California,[97] where it is estimated that more than 150 cases are pending against Bridgestone/Firestone.[98] California has a much less re-

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[91] *See* Speedy Trial Act of 1974, 18 U.S.C. § 3165(b) (2000).

[92] H.R. 2341, § 4.

[93] *See supra* text accompanying notes 9–10.

[94] *See* Barnaby J. Feder, *Unusual Line of Business for Lawyers*, N.Y. TIMES, Aug. 16, 2000, at C1.

[95] *See supra* text accompanying notes 72–89.

[96] *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. . . . [W]e add that this litigation is not manageable as a class action even on a statewide basis"); Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595 (D.C.N.Y. 1982).

[97] *See supra* text accompanying note 80.

[98] *See* Christopher Whalen, *Consumers Turn to Trial Lawyers*, INSIGHT ON THE NEWS, Sept. 2, 2002.

strictive requirement for "permissive joinder" than the federal system does,[99] as well as additional statutes providing more procedural options for bringing class actions.[100] Even if the federal courts ultimately remand the cases back to state court—and many have because plaintiffs failed to meet diversity, amount in controversy, or federal question requirements[101]—the delay and its attendant costs could be debilitating for plaintiffs.

House Bill 2341 would also allow tobacco companies to remove state class actions involving state causes of action to federal court. In fact, since the major tobacco companies are all domiciled in states where class actions are not being brought, minimal diversity as required by this Bill[102] will always exist between the plaintiffs and tobacco companies. The Bill, therefore, would have effectively granted the tobacco industry a free pass to federal court, where it would be much more difficult for plaintiffs to prevail in class action cases.[103]

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[99] *See* CAL. CIV. PROC. CODE § 382 (West 2003) (allowing for class action status "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.").

[100] *See* CAL. CIV. CODE § 1781 (West 2003); CAL. BUS. & PROF. CODE § 17204 (West 2003).

[101] *See* Carden v. Bridgestone/Firestone, Inc., 2000 WL 33520302, at *1–*4 (S.D. Fla. Oct. 18, 2000); Dorian v. Bridgestone/Firestone, Inc., 2000 WL 1570627, at *1–*4 (E.D. Pa. Oct. 19, 2000); Lennon v. Bridgestone/Firestone Inc., 2000 WL 1570645, at *1–*4 (E.D. Pa. Oct. 19, 2000); Beatty v. Bridgestone/Firestone, Inc., 2000 WL 1570590, at *1–*3 (E.D. Pa. Oct. 19, 2000); Miller v. Bridgestone/Firestone, Inc., 2000 WL 1570732, at *1–*4 (E.D. Pa. Oct. 19, 2000). *But see In re* Bridgestone/Firestone, Inc., 2001 WL 876921, at *1 (S.D. Ind. May 11, 2001) (denying motion to remand); Trujillo v. Bridgestone/Firestone, Inc., 2000 WL 1690308, at *1 (N.D. Ill. Nov. 1, 2000) (same).

[102] *See* H.R. 2341, § 4(a)(2).

[103] The Bill is opposed by the Tobacco Products Liability Project, *see Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing Before the House Comm. on the Judiciary*, 106th Cong. 171–80 (1999) [hereinafter *Interstate Class Action Hearing*] (statement of Richard A. Daynard, Professor of Law, Northeastern University School of Law and Chairman, Tobacco Products Liability Project); Americans for Nonsmokers' Rights, *see* Letter from Julia Carol and Robin Hobart, Co-Directors, Americans for Nonsmokers' Rights, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); the National Center for Tobacco-Free Kids, *see* Letter from Matthew Meyers, Executive Vice President and General Counsel, National Center for Tobacco-Free Kids, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); and Save Lives, Not Tobacco, a coalition that includes the American Lung Association and the American Medical Woman's Association, *see* Letter from Paul G. Billings, American Lung Association; Michele Bloch, American Medical Women's Association; Joan Mulhern, Public Citizen; & William Godshall, SmokeFree Pennsylvania to House Judiciary Committee Member[s] (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); and the Coalition for Workers Health Care Funds, which represents non-profit trust funds established jointly by labor and management to provide medical care to approximately 30 million workers, retirees, and their families. *See* Letter from David Mallino, Legislative Director, Coalition for Workers Health Care Funds, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with House Judiciary Committee Democratic staff).

The Campaign for Tobacco-Free Kids argued that a predecessor version of the Bill "correspond[ed] perfectly with the industry's litigation strategy, and further[ed] the industry's goal of avoiding liability" by shifting cases to federal court, where tobacco companies prefer to litigate.[104] Similarly, Professor Richard Daynard has observed that allowing tobacco companies to move suits into federal court "would have the almost-certain effect of extinguishing all class actions against tobacco companies" because "the federal courts have been unwilling to permit individual tobacco victims to band together in class claims."[105] As a Florida court has observed, if the law bars these plaintiffs from joining together as a class, the cost of bringing suit will be prohibitive and most will never obtain a remedy.[106] By effectively erecting this barrier, House Bill 2341 would have blocked these suits.

The Bill would also benefit companies marketing gun products that are dangerous and defective and have no reasonable use in self-defense. As M. Kristen Rand, the legislative director of the Violence Policy Center, has testified, "Litigation is the only mechanism available to consumers and victims of firearms violence to hold the gun industry accountable when it acts negligently or recklessly."[107] Several suits have succeeded in holding the gun industry accountable: a state class action brought in Texas, for example, resulted in a $31 million settlement against gun manufacturer Remington.[108] This case could easily have failed in federal court because, as the general counsel for Handgun Control has written, "federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however[,] many cases require courts to extend the laws, or to apply established law to a new situation."[109] In cases against the gun industry, then, House Bill 2341 would give defendants an unfair advantage by allowing them to transfer cases based on state law to federal court simply because there is minimal diversity between the plaintiffs and defendants.

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[104] Letter from Matthew Meyers to Representative John Conyers, *supra* note 103, at 2.

[105] *Interstate Class Action Hearing*, *supra* note 103, at 176–77 (prepared statement of Richard A. Daynard, Professor of Law, Northeastern University School of Law and Chairman, Tobacco Products Liability Project) (citing Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996)).

[106] *See* Broin v. Phillip Morris Cos., 641 So. 2d 888, 891–92 (Fla. Dist. Ct. App. 1994).

[107] *Protection of Lawful Commerce in Arms Act: Hearing Before the House Committee on Energy and Commerce*, 107th Cong. 76 (2002) (prepared statement of M. Kristen Rand, Legislative Director, Violence Policy Center). The Bill is opposed by Handgun Control, *see* Letter from Dennis Henigan, General Counsel, Handgun Control, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 16, 1998) (on file with House Judiciary Committee Democratic staff), and the Coalition to Stop Gun Violence. *See* Letter from Michael K. Beard, President, Coalition to Stop Gun Violence, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 21, 1998) (on file with House Judiciary Committee Democratic staff).

[108] *See* Garza v. Sporting Goods Properties, Inc., No. CIV. A. SA-93-CA-108, 1996 WL 56247, at *9 (W.D. Tex. Feb. 6, 1996).

[109] Letter from Dennis Henigan to Representative John Conyers, *supra* note 107, at 1.

Finally, the class action legislation would undermine a series of recent suits against health maintenance organizations ("HMOs") resulting from their alleged fraud, over-billing, and failure to provide coverage.[110] The Bill would threaten suits like that of Harold Katlin, who filed a class action in Pennsylvania state court against his HMO, alleging that the HMO had failed to verify that Katlin's psychiatrist was licensed, failed to supervise him, and, nonetheless, referred patients to him.[111] The court certified a variety of class claims.[112] In general, class action suits against HMOs have achieved greater success in state court than they have in federal court.[113] We should not handicap these important suits before they have even begun by allowing defendants to bring them into federal court.

CONCLUSION

House Bill 2341 would allow defendants to remove class actions involving state law issues from state courts—the forums most convenient for the victims of wrongdoing and most familiar with the substantive law involved—to federal courts, where the class is less likely to be certified and the case will take longer to resolve. This shift would seriously undermine the delicate balance between federal and state courts. Just as it would threaten to overwhelm federal courts by causing the removal of resource-intensive class action cases to federal district courts, so would it increase the burdens on state courts, as class actions rejected by federal courts metamorphosized into numerous individual state actions. It would also block state courts from enforcing both the substantive and procedural law of their states.

The proposed legislation cannot be seen as merely prohibiting nationwide class actions filed in state court, as some of its proponents suggest it should be.[114] This legislation goes much further and bars state

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[110] By effectively denying patients access to state courts, House Bill 2341 would run counter to Congress's efforts to expand patient access to state courts in other contexts. *See Smarter Health Care Partnership for American Families: Making Federal and State Roles in Managed Care Regulation and Liability Work for Accountable and Affordable Health Care Coverage: Hearing Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 107th Cong. 6 (2001) (statement of Rep. John D. Dingell (D-Mich.)).

[111] Katlin v. Tremoglie, 43 Pa. D. & C.4th 373, 374–76 (Pa. C.P. Philadelphia County 1999).

[112] *Id.* at 374–75.

[113] *See* Edith M. Kallas et al., *Class Actions in the Healthcare Context*, *in* HEALTH CARE LITIGATION: WHAT YOU NEED TO KNOW AFTER *PEGRAM* 14 (Practising Law Institute ed., 2000) (collecting cases).

[114] *See, e.g.*, *Interstate Class Action Hearing*, *supra* note 103, at 56 (statement of Walter E. Dellinger III, former Solicitor General, Department of Justice) ("The upshot of the legislation is therefore to allow federal courts to exercise jurisdiction over truly interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.") (referring to a predecessor bill to House Bill 2341).

class actions filed solely on behalf of residents of a single state, involving only matters of that state's law, so long as one plaintiff resides in a different state from one defendant—an extreme and distorted definition of diversity that does not apply in any other legal proceeding.